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Public Prosecutor v Mat Zali bin Lahman

HIGH COURT (ALOR STAR) — CRIMINAL APPEAL NO 41–97 OF 2007

B

ZAMANI A RAHIM JC

14 SEPTEMBER 2009

C *Evidence — Witness — Interested witness — Fatal accident — Whether oral testimony consistent with police report — Whether magistrate failed to judicially appreciate evidence — Evidence Act 1950 ss 157 & 134*

D *Road Traffic — Dangerous driving — Causing death by dangerous driving — Whether magistrate erred in finding that prosecution failed to prove accused was driving dangerously — Whether failure to prove identity of deceased warranted acquittal and discharge of accused — Road Transport Act 1987 ss 41(1), (4), 42 & 43*

E

The accused was charged with driving a motorcar in a manner which having regard to all the circumstances was dangerous to the public and thereby causing the death of one Mohd Faezuan bin Nordin, a 14 month old infant ('the deceased infant'), an offence under s 41(1) of the Road Transport Act

F 1987 ('the Act'). It was the prosecution's case that on 17 December 2002 at about 10.30am while the deceased infant's father ('SP5') was driving his motorcar along Jalan Sungai Perahu, Jentang, the accused had encroached into SP5's right of way and collided head on with SP5's motorcar. As a result of the collision the deceased infant who was seated on his mother's lap in the

G passenger front seat passed away. During the trial, evidence was adduced to show that at a slight right hand bend in the road the accused who was coming from the opposite direction overtook a motorcar in front of him and that in the process of overtaking that car at a speed reckoned to be excessive encroached into SP5's right of way and rammed into SP5's motorcar head on.

H The force of this collision had pushed SP5's motorcar off the road and to land beyond the grass road shoulder facing in the opposite direction. After having heard the oral testimonies of SP5 and his wife and after taking into consideration the mute evidence of the photographs, the sketch plan and Puspakom reports the magistrate made a finding that the prosecution had

I failed to prove that the accused was driving dangerously having regard to all the circumstances at the material time. The magistrate was also of the view that all the passengers travelling in SP5's motorcar ought to testify about the accused overtaking the motorcar in front of him before the collision. At the close of the prosecution's case, the magistrate dismissed the charge against the

accused and acquitted and discharged him. This was the prosecution's appeal against that decision.

Held, allowing the appeal:

(1) All the findings of fact were indicative of the fact that the accused was speeding. Viewed objectively he had created a dangerous situation by overtaking the motorcar which proceeded in the same direction and the accused was certainly at fault (see para 14).

(2) The magistrate did not judicially appreciate SP5's testimony that the accused overtook the motorcar in front of him before the collision, especially since SP5's testimony was consistent with the police report made by him. Further, it would appear that the magistrate had forgotten s 134 of the Evidence Act 1950 which provides that 'No particular number of witnesses shall in any case be required for the proof of any fact'. In the circumstances the magistrate was incorrect in her finding that the prosecution had not showed that the accused had driven his motorcar dangerously as required under s 41(1) of the Act (see paras 15–16).

(3) The magistrate was correct in finding that the prosecution had not proven the identity of the deceased which was an essential and important element of an offence under s 41(1) of the Act. However, although the identity of the deceased was not established, legislation has made express provision under s 41(4) that 'the court may upon the trial of a person for an offence under this section (ie s 41(1)) convict such person for an offence under section 42 or section 43 of the Act'. Thus although the identity of the deceased infant cannot be proven, s 42 of the Act did not require proof of death as a result of reckless or dangerous driving (see paras 17 & 19).

[Bahasa Malaysia summary

Tertuduh dituduh atas kesalahan memandu kereta dengan cara yang membahayakan kepada orang awam dan menyebabkan kematian Mohd Faezuan bin Nordin, bayi berumur 14 bulan ('si mati'), suatu kesalahan di bawah s 41(1) Akta Pengangkutan Jalan 1987 ('Akta'). Adalah menjadi kes pihak pendakwaan bahawa pada 17 Disember 2002 kira-kira jam 10.30 pagi semasa bapa si mati ('SP5') memandu keretanya sepanjang Jalan Sungai Perahu, Jentang, tertuduh telah makan jalan SP5 dan berlanggar dengan kereta SP5. Akibatnya, si mati yang duduk di pangkuan ibunya di tempat duduk penumpang di bahagian hadapan meninggal dunia. Semasa perbicaraan, keterangan dikemukakan untuk menunjukkan bahawa di selekoh dan pada bahagian agak kanan sedikit jalan tersebut, tertuduh yang memandu dari hadapan memotong sebuah kereta di hadapannya dan semasa memotong pada kelajuan yang tinggi telah makan jalan SP5 dan

menghentam kereta SP5 depan sama depan. Hentaman perlanggaran tersebut mengakibatkan kereta SP5 terbabas keluar dari jalan raya tersebut dan jatuh melepasi bahu jalan yang berumput menghadap arah yang bertentangan. Setelah mendengar keterangan lisan SP5 dan isterinya dan selepas mempertimbangkan keterangan gambar-gambar, peta lakar dan laporan-laporan Puspakom, majistret memutuskan bahawa pihak pendakwaan gagal membuktikan bahawa tertuduh memandu dengan berbahaya setelah mengambilkira keadaan-keadaan pada masa yang material itu. Majistret juga berpendapat bahawa kesemua penumpang dalam kereta SP5 harus memberi keterangan tentang tertuduh memotong kereta di hadapannya sebelum perlanggaran berlaku. Pada penutup kes pendakwaan, majistret menolak tuduhan terhadap tertuduh dan melepaskan dan membebaskannya. Ini merupakan rayuan pendakwaan terhadap keputusan tersebut.

Diputuskan, membenarkan rayuan:

(1) Semua penemuan fakta menunjukkan fakta bahawa tertuduh memandu dengan laju. Dilihat secara objektifnya, dia telah mewujudkan suatu keadaan yang berbahaya apabila memotong kereta di hadapannya dan tertuduh bersalah dalam hal ini (lihat perenggan 14).

(2) Majistret tidak menilai secara kehakiman keterangan SP5 bahawa tertuduh memotong kereta di hadapannya sebelum perlanggaran berlaku, lebih-lebih lagi apabila keterangan SP5 konsisten dengan laporan polis yang telah dibuatnya. Selanjutnya, seolah-olah majistret telah lupa s 134 Akta Keterangan 1950 yang memperuntukkan bahawa 'Tiada bilangan tertentu bagi saksi dikehendaki dalam mana-mana kes untuk membuktikan sesuatu fakta'. Dalam keadaan-keadaan ini, majistret khilaf dalam keputusannya apabila mendapati bahawa pihak pendakwaan tidak membuktikan bahawa tertuduh memandu kereta dengan berbahaya seperti yang dikehendaki oleh s 41(1) Akta (lihat perenggan 15–16).

(3) Majistret adalah betul apabila memutuskan bahawa pihak pendakwaan tidak membuktikan identiti si mati yang merupakan elemen penting dan perlu bagi kesalahan di bawah s 41(1) Akta. Walau bagaimanapun, jika identiti si mati tidak dapat dibuktikan, perundangan telah menggubal peruntukan jelas di bawah s 41(4) bahawa 'Mahkamah boleh apabila membicarakan seseorang kerana suatu kesalahan di bawah seksyen ini, mensabitkan orang itu kerana suatu kesalahan di bawah seksyen 42 atau seksyen 43'. Oleh itu, walaupun identiti si mati tidak dapat dibuktikan, s 42 Akta tidak memerlukan bukti kematian akibat daripada pemanduan berbahaya atau semberono (lihat perenggan 17 & 19).]

Notes

For cases on causing death by dangerous driving, see 11 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 23–25.
For cases on interested witness, see 7(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2858–2865.

Cases referred to

Gunasekaran a/l Buchia lwn Pendakwa Raya [1994] MLJU 9; [1995] 2 CLJ 397, HC (refd)
Hussin bin Ismail v PP [2000] MLJU 392; [2000] 8 CLJ 210, HC (refd)
Lim Chin Poh v PP [1969] 2 MLJ 159, HC (refd)
PP v Ong Kia Chian [2006] 7 MLJ 230; [2006] 4 CLJ 334, HC (refd)
PP v Zulkifli bin Omar [1998] 6 MLJ 65; [1998] 1 CLJ 1079, HC (refd)
Ramiah v PP [1972] 2 MLJ 258, HC (refd)

Legislation referred to

Criminal Procedure Code s 158
Evidence Act 1950 ss 134, 157
Road Traffic Ordinance 1958 s 34A
Road Transport Act 1987 ss 41(1), (4), 42, 43

Allan Suman (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.
Prem Singh (Prem Subra & Associates) for the respondent.

Zamani A Rahim JC:

THE CHARGE

[1] The charge against the appellant ('accused') was under s 41(1) of the Road Transport Act 1987 ('the Act') and the charge read as follows:

> Bahawa kamu pada 17/12/2002 jam lebih kurang 11.00 pagi di Jalan Sungai Perahu, Jeniang di dalam Daerah Kuala Muda, Kedah semasa memandu motorkar No WFA 2278 di atas jalanraya tersebut kamu telah memandu dalam keadaan yang merbahaya dan menyebabkan kematian Mohd. Faezuan bin Nordin KP 000930140609. Oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 41(1) Akta Pengangkutan Jalan 1987 (Pindaan 1999 Akta A1065) yang boleh dihukum di bawah seksyen dan Akta yang sama.

THE PROSECUTION CASE

[2] The prosecution case may be summarised as follows.

A **[3]** On 17 December 2002, at about 10.30am, SP5 was driving his motorcar, WHR 9491 from the direction of Jeniang towards Sungai Petani. Together with him in the said motorcar were his wife, SP4, three children including 14 month old son, a cousin and a mother-in-law. The wife, SP4 was seated on the passenger front seat next to SP5. The 14 month old son, **B** Mohd Faezuan bin Nordin was on her lap.

[4] Upon arrival at a bend at Jalan Sungai Perahu, Jeniang, a motorcar, WFA 2278 driven by the accused came from the opposite direction, at a distance of about 50 metres overtook a motorcar in front of him. In the **C** course of overtaking, the accused had encroached into SP5's right of way. SP5 evaded to the left onto the grass road shoulder and at the same time, SP5 gave a warning by flashing high light. The accident was not to be avoided. The accused's motorcar veered of his path and collided on with SP5's motorcar. As a result of the collision, SP5's 14 month old son, Mohd Faezuan bin Nordin **D** had passed away.

[5] A police report vide Kuala Muda Report No 6602/02 was lodged by SP5.

E LAW

[6] The offence of s 41(1) of the Act provides:

> **F** Any person who, by the driving of a motor vehicle on a road recklessly or at a speed or in a manner which having regard to all the circumstances (including the nature, condition and side of the road, and the amount of traffic which might be expected to be on the road) is dangerous to the public, cause the death of any person shall be guilty of an offence and shall on conviction be punished with imprisonment for a term of not less than two years and not more than ten years and to a fine of not **G** less than five thousand ringgit and not more than twenty thousand ringgit.

[7] The predecessor of s 41(1) of the Act was s 34A of the Road Traffic Ordinance 1958. In considering s 34A in *Ramiah v Public Prosecutor* [1972] 2 MLJ 258, Raja Azlan Shah (as he then was) said:

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> It is not the law under s 34A of the Road Traffic Ordinance that merely because an accident had happened and a person had been killed, danger had in that sense arisen and therefore it must follow, as the night, the day, that the appellant was driving in a manner dangerous to the public. In a case under s 34A, two things **I** must be established. First, there must be a situation created by the accused which,

viewed objectively, is dangerous. Dangerous driving is not defined in the Road Traffic Ordinance and it is up to the court to come to a decision on the evidence.

[8] In another case *Public Prosecutor v Ong Kia Chian* [2006] 7 MLJ 230; [2006] 4 CLJ 334 it was held as follows:

In a case of dangerous driving, the prosecution must establish that:

(a) a situation created by the accused is dangerous eg turning right into the side road without stopping to give way to through traffic; and

(b) when creating a situation the accused was at fault. Fault involves a failure; a failing below the care and skill of a competent and experienced driver in relation to the manner of driving and the relevant circumstances (per Raja Azlan Shah in *Ramiah v Public Prosecutor* at pp 258–259).

[9] In my view there are three distinct offences under this section because the use of the word 'or' which is disjunctive. They are:

(a) by driving a motor vehicle recklessly;

(b) by driving a motor vehicle at a speed;

(c) by driving a motor vehicle in a manner which having regard to all circumstances (including the nature, condition and size of the road, and the amount of traffic which is or might be expected to be on the road) is dangerous to the public; and

(d) either one or the above mentioned driving has cause the *death* of a person.

[10] In the current case, the accused was charged with element (c) above stated, though the said element was not cited in full in the charge. The accused was not misled by it. The prosecution is required to prove firstly, the accused was driving in a manner having regard to all the circumstances at the material time of accident including the nature, condition and size, and the amount of traffic which is or might be expected to be on the road, was dangerous to the public. Secondly, such driving by the accused had caused the death of Mohd Faezuan bin Nordin.

[11] The central facts here are these. The accused was coming from the opposite direction, overtook a motorcar in front of him. In the process of overtaking, at a speed reckoned to be excessive, encroached into SP5's right of way and rammed into SP5's motorcar head on. The force of the collision had pushed SP5's motorcar off the road and landed beyond its grass road shoulder facing Sungai Petani. Whilst the accused motorcar rested across SP5's side of the road with its head facing SP5's motorcar.

[12] The place of collision was at a slight right hand bend. There were scrubs and bushes on the right side of the road facing Jeniang. There was a double white line on the centre of the road. The road was narrow.

[13] The sketch plan showed there were two brake marks, H1–H2 and H3–H4. The brake marks, H1–H2 was approximately 15.70 metres. The beginning of the brake mark, H1 was on the accused side of the road, closed to the double white lines about 0.10 metres. The brake mark cut across the centre double white line and ended at the rear off side of the accused motorcar. Similarly, the brake mark, H3–H4 ended at the front off side of the accused motorcar (no measurement was taken on the length of this brake mark, but appeared to be shorter than the brake mark, H1–H2). There was also glass splinters marked I in the sketch plan which showed the point of impact was on SP5's side of the road.

[14] All the above findings are indicative that the accused was speeding. Viewed objectively he had created a dangerous situation by overtaking the motorcar in front of him, which proceeded in the same direction and the accused certainly was at fault. In the case of *Lim Chin Poh v Public Prosecutor* [1969] 2 MLJ 159, Choor Singh J said:

> In my opinion the expression driving in a manner which is dangerous to the public indicates some dangerous act or manoeuvre on the part of the driver of a vehicle, eg, overtaking a vehicle on the wrong side of it or *overtaking in the face of on-coming traffic* or overtaking when unable to see on-coming traffic or crossing a junction against traffic light and so on. There must be some positive act on the part of the driver which is dangerous having regard to all circumstances.

[15] The learned magistrate had made a finding that the prosecution had failed to prove that the accused was driving dangerously having regard to all the circumstances of the material time of collision including the nature, condition and size of the road, contrary to the oral testimonies of SP5 and SP4, the mute evidence of the photographs, P3A–K, the sketch plan, P5 and P5K and Puspakom reports, P7 and P8 respectively. The learned magistrate appeared to have doubted the presence of the motorcar which was overtaken by the accused just before the collision. Despite no finding that SP5 and SP4 were unreliable and incredible witnesses, the learned magistrate appeared to have insisted that the prosecution should have called the four remaining passengers of SP5's motorcar to testify about the accused overtaking the motorcar in front of him before the collision. The learned magistrate did not seem to judicially appreciate that SP5's testimony in this respect was consistent with his police report, P4: see s 157 of the Evidence Act 1950. Another provision which appeared to have escaped the learned magistrate attention is s 134 of the Evidence Act which says 'No particular

number of witness shall in any case be required for the proof of any fact'. According to S Augustine Paul (currently our FCJ) in his book *Evidence Practice and Procedure* — 'This section enshrines the well recognised maxim that 'Evidence has to be weighed and not counted'.

[16] Having said all that, I do not agree with the learned magistrate's finding that the accused did not drive his motorcar, WFA 2278 dangerously within element (c) of the offence under s 41(1) of the Act which resulted in the accident on that fateful day. She dismissed the charge at the close of the prosecution, acquitted and discharged the accused.

[17] However, I am in agreement with the learned magistrate that the prosecution had failed to prove the identity of the deceased, another important element of an offence under s 41(1) of the Act, that is, element (d) above stated. In the case of *Hussin bin Ismail v Public Prosecutor* [2000] MLJU 392; [2000] 8 CLJ 210, it was said:

> Although the husband of the deceased (SP3), the investigating officer (SP8) and the medical officer who examined the deceased were called to testify on behalf of the prosecution, the prosecuting officer did not ask these witness any question to establish the identity of the deceased. Therefore, the prosecution had not proven the identity of the deceased which was an essential and important ingredient of the charge …

(See also *Gunasekaran a/l Buchia lwn Pendakwa Raya* [1994] MLJU 9; [1995] 2 CLJ 397).

[18] Though the identity of the deceased was not established, for that reason the Legislature has, in all its wisdom, made express provision under s 41(4) that 'the court may upon the trial of a person for an offence under this section (ie s 41(1)) convict such a person for an offence under section 42 or section 43': see *Public Prosecutor v Zulkifli bin Omar* [1998] 6 MLJ 65; [1998] 1 CLJ 1079 at p 71 (MLJ); p 1085 (CLJ). Just because an identity of the dead person involved in the road accident cannot be proved, it does not mean the accused may get scot-free. Section 42 does not require proof of death as a result of a reckless or dangerous driving.

[19] On the evidence, if the learned magistrate had properly addressed her mind to the law and the facts of this case, she would not have made the decision she did. In the light of the above, in exercising my discretion under s 158 of the Criminal Procedure Code, I, therefore, allowed the prosecution's

appeal. The accused is called upon to make his defence under s 42 of the Act. The case is hereby remitted back to the Magistrate Court Gurun for the accused defence to be called.

Appeal allowed.

Reported by Kohila Nesan